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Why Same-Sex Spouses Should Be Granted Preferential Immigration Status: Reevaluating Adams v. Howerton

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I. INTRODUCTION

Pat is a citizen of Denmark. Lee is a citizen of the United States and a resident of Hawaii. They marry legally in Denmark and want to live together in the United States. Ordinarily, this would raise no legal dilemma. As the spouse of a U.S. citizen, Pat would be entitled to become a legal permanent resident of the United States.[1] But what if Lee and Pat are both men, or both women? In either case, whether Pat is entitled to become a legal permanent resident is unclear.

At present, no U.S. state permits people of the same sex to marry. Nevertheless, many states have recently expanded the rights granted to homosexuals. In Hawaii, for example, the Supreme Court recently held that to deny homosexuals the right to marry may violate that state's Equal Rights Amendment.[2]

Additionally, although no U.S. state permits same-sex marriages, they are recognized by some foreign countries, including Denmark and Norway.[3] Thus, an American citizen can have a valid same-sex marriage to a foreign citizen under foreign law. This, however, can lead to problems because a state court in the United States may not recognize that foreign marriage as valid.

Current U.S. law does not recognize a same-sex spouse as a "spouse" for immigration purposes. Thus, while a party to a heterosexual marriage can gain his or her spouse's entry into the United States by virtue of the valid marriage, the spouse of a homosexual is denied that opportunity.

This Note will examine how U.S. courts currently approach this issue within the framework of the leading case, *Adams v.*

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1. 8 U.S.C. § 1151(b)(2)(A)(i) (Supp. IV 1992).
2. *See infra* note 29 and accompanying text.
3. *See infra* notes 49-60 and accompanying text.

Howerton.[4] The first Section delineates the *Adams* decision. The second Section argues that a same-sex marriage can be valid under state law, meeting the first part of the test established in *Adams*. The third Section argues that a valid same-sex marriage is sufficient under the Immigration and Nationality Act ("INA") to confer "spouse" status on a same-sex spouse, meeting the second part of the test established in *Adams*. The fourth Section concludes that, under existing law, same-sex spouses should be treated the same as opposite-sex spouses for immigration purposes.

A. The Federal Court Approach

1. The Factual Basis of *Adams v. Howerton*

In *Adams v. Howerton*, the Ninth Circuit Court of Appeals faced a situation similar to the hypothetical above.[5] Adams, an American male, and Sullivan, an Australian male, obtained a marriage license in Colorado, where they participated in a marriage ceremony with a minister in 1975.[6] Adams petitioned the Immigration and Naturalization Service ("INS") to classify Sullivan, his spouse, as the immediate relative of an American citizen under 8 U.S.C. § 1151(b).[7] The INS denied the petition, and the Board of Immigration Appeals affirmed the denial.[8] Adams and Sullivan filed an action in the U.S. District Court for the Central District of California to challenge the administrative decision.[9] They claimed that they were married to each other, that each was the other's spouse under state and federal law, and that the law was unconstitutional under the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the extent that it deprived them of their marital status.[10]

The district court held that Adams and Sullivan were not legally married under state law, and that even if the state law recognized the marriage, Congress did not intend to recognize such

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4. Adams v. Howerton, 673 F.2d 1036 (9th Cir.), *cert. denied*, 458 U.S. 1111 (1982) [hereinafter *Adams II*].

5. *Id.*

6. Adams v. Howerton, 486 F. Supp. 1119, 1120 (C.D. Cal. 1980) [hereinafter *Adams I*].

7. *Adams II*, 673 F.2d at 1038.

8. *Id.*

9. *Adams I*, 486 F. Supp. at 1121.

10. *Id.*

a relationship.[11] The court also rejected the constitutional challenges.[12]

2. Sullivan Fails the Court of Appeal's Two-Part Test for Qualification as a Spouse for Immigration Purposes

The Court of Appeals affirmed the district court's decision[13] and established a two-part test for determining whether a marriage will be recognized for immigration purposes: first, the court asks whether the marriage is valid under state law; and, second, the court determines whether the state-approved marriage qualifies under the INA.[14] In the *Adams* case, the court found it unnecessary to determine whether Colorado would recognize a same-sex marriage[15] because the court found that the second part of the test was not met.

In applying the second part of the test, the court first acknowledged Congress' plenary power in the area of federal immigration, stating that "so long as Congress acts within constitutional constraints, it may determine the conditions under which immigration visas are issued. Therefore, the intent of Congress governs the conferral of spouse status under section 201(b) [of the INA], and a valid marriage is determinative only if Congress so intends."[16]

The court then found that Congress did not intend for same-sex marriages to qualify under the INA. It examined who may be considered a "spouse" for purposes of the Act, citing Section 101 of the Act, which provides that the term "spouse" does not apply to persons who were not in each other's physical presence during the marriage ceremony, unless the marriage is consummated.[17] The court also noted that valid marriages entered into by persons "not intending to live together as husband and wife are not

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11. *Id.* at 1123-24.
12. *Id.* at 1025.
13. *Adams II*, 673 F.2d at 1036.
14. *Id.* at 1038. In *In re* Gamero, 14 I. & N. Dec. 674 (B.I.A. 1974), the Board of Immigration Appeals noted that the validity of a marriage is governed by the law of the place where the marriage was celebrated. *Id.* The Board also noted, however, that even if a marriage is legally valid where celebrated, it "is not invariably recognized as sufficient to confer immigration benefits. Immigration benefits will not be granted in cases where the couple has not established a bona fide subsisting marital relationship." *Id.* at 676.
15. *Adams II*, 673 F.2d at 1039.
16. *Id.*
17. *Id.* (discussing then-applicable INA § 101(a)(35)).

recognized for immigration purposes."[18] The court concluded that a marriage that is valid under state law does not necessarily confer spouse status under the Act.[19]

Applying this analysis to the facts, the court determined that Congress did not intend for homosexual marriages to confer spouse status under the INA. In doing so, the court found that marriage is ordinarily a status granted to two persons of the opposite sex.[20] Thus, in the absence of evidence of contrary intent by Congress, the word "marriage" should be given its "ordinary, contemporary, common meaning."[21] The court also noted that to recognize homosexual marriages for immigration purposes would contradict Congress' stated intent to exclude homosexuals from admission into the United States by categorically excluding "sexual deviates."[22]

3. The Court Rejects the Plaintiff's Fourteenth Amendment Claims

Finally, the court rejected the plaintiffs' Fourteenth Amendment claims.[23] Recognizing its limited power of review over Congress' decisions to admit or exclude aliens, because of Congress' "almost" plenary power in this area, the court declined to apply a strict standard of review.[24] Without discussing why Congress did not extend "spouse" status to include partners in homosexual marriages, the court held that a rational basis existed for Congress' decision to confer "spouse" status only to individuals in heterosexual marriages, and that this did not violate the Due Process and Equal Protection Clauses.[25]

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18. *Id.* at 1040.
19. *Id.*
20. *Adams II*, 673 F.2d at 1040.
21. *Id.*
22. *Id.* at 1040-41.
23. The Fourteenth Amendment Equal Protection Clause is not binding on the federal government; however, through "reverse incorporation," the federal government is also bound by the Equal Protection Clause. Bolling v. Sharpe, 347 U.S. 497 (1954).
24. *Adams II*, 673 F.2d at 1041.
25. *Id.* at 1042-43.

B. Different Circumstances Justify a Change in Immigration Law

Much has changed since *Adams* was decided eleven years ago. In 1982, no state in the United States, and no country in the world, recognized same-sex marriages. In 1989, however, Denmark became the first country to legalize same-sex marriages;[26] Norway followed in 1993.[27] These countries treat homosexual and heterosexual marriages identically, except that homosexuals are not permitted to adopt children.[28]

Homosexual rights are also expanding in the United States. Although no state recognizes homosexuals' right to marry, the Hawaii Supreme Court has recently held that homosexuals are a suspect class entitled to strict scrutiny protection under the Equal Rights Amendment of that state's constitution, and that the state must have a compelling interest to justify its refusal to allow homosexuals to marry.[29]

In addition, many municipalities throughout the United States have enacted or attempted to enact legislation providing domestic partnership benefits to homosexuals who register their partners with the municipality.[30] Registered partners receive many of the private benefits that heterosexual spouses receive from marriage.[31]

Congress has also changed some of its views regarding homosexual rights. For example, homosexuals have been removed from the list of classes excluded from immigration.[32]

Thus, there is a growing trend toward the recognition of rights traditionally denied to homosexuals. Changes in the law since *Adams* was decided suggest that a spouse in a homosexual marriage could now meet both requirements set out by the *Adams* court for recognition of a marriage for immigration purposes.

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26. Julian Isherwood, *Denmark Legalizes Homosexual Marriages*, UPI, May 26, 1989, *available in* LEXIS, News Library, Allnws File.

27. Fiona Smith, *Norway Legalizes Gay Marriages*, IRISH TIMES, Aug. 4, 1993, *available in* LEXIS, News Library, Allnws File.

28. *See infra* notes 51 and 61.

29. Baehr v. Lewin, 852 P.2d 44 (Haw. 1993).

30. *See infra* notes 119-36 and accompanying text.

31. *Id.*

32. *See* 8 U.S.C. § 1182 (Supp. IV 1992).

Consequently, it is time to reconsider the result achieved by the *Adams* court eleven years ago.

II. A HOMOSEXUAL MARRIAGE MAY BE VALID UNDER STATE LAW FOR A SPOUSE TO QUALIFY FOR LEGAL PERMANENT RESIDENT STATUS

Under the first part of the test established in *Adams v. Howerton*, the same-sex marriage must be valid under state law to be recognized for immigration purposes.[33] "[M]arriage is a social relation subject to the State's police power";[34] thus, courts defer almost completely to the state's judgment in determining the validity of marriages. Because no state in the United States, nor any country in the world, recognized a homosexual's right to marry when *Adams* was decided, it was impossible to meet the *Adams* test. Currently, however, homosexuals may marry legally in two European countries and can enjoy expanded rights in other countries. In addition, recent U.S. court decisions suggest that same-sex marriages should be recognized.

A. The Expansion of Homosexual Rights in Europe and Canada

Most European countries do not recognize same-sex marriages.[35] Since *Adams* was decided in 1982, however, many countries have expanded homosexual rights generally, and have also debated recognizing homosexual marriages. For example, Russia has decriminalized consensual sex between males, and gay rights activists there are pursuing "homosexual partnership" or marriage rights.[36] In France, where the number of marriages fell by one-third from 1975 to 1987, and the number of unmarried

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33. *Adams II*, 673 F.2d at 1038.

34. Loving v. Virginia, 388 U.S. 1, 7 (1967) (restricting freedom to marry based on racial classifications violates the equal protection clause).

35. German law does not allow homosexuals to marry legally. Nevertheless, German homosexuals have gone to registry offices and attempted to marry. Alexander Ferguson, *German Gays Turned Down at the Registry Office*, Reuter Libr. Rep., Aug. 19, 1992, *available in* LEXIS, News Library, Allnws File.

British homosexuals have also tried this tactic. Like German homosexuals, they have been refused. Bill Frost, *Male 'Nuns' Campaign for Right to Gay Marriage*, THE TIMES (London), Mar. 20, 1992, *available in* LEXIS, News Library, Allnws File.

36. *Press Conference on Gay and Lesbian Rights (Russian-American Information Center, Khlebny Pereulok)*, Federal Information Systems Corp., Official Kremlin Int'l News Broadcast, June 2, 1993, *available in* LEXIS, News Library, Allnws File.

couples living together quadrupled from one-half million in 1975 to two million in 1992, activists have proposed a "contract of civil union" to grant unmarried heterosexual and homosexual couples the same rights that married couples receive regarding death duties, pensions, and child custody.[37]

In Canada, homosexuals are challenging the law forbidding them to marry by claiming a violation of their equality rights under the Charter of Rights and Freedoms.[38] The Canadian Government has proposed legislation to add sexual orientation to a list of characteristics, including race and religion, against which it is illegal to discriminate in employment and public service.[39] Unfortunately, the same legislation would define marital status as a heterosexual relationship.[40]

It is likely that Canada will grant additional rights to same-sex couples in the future. Ontario's Attorney-General has promised legislation that will give same-sex couples rights and benefits, and she has promised to eliminate the word "spouse" from Ontario's laws.[41] Furthermore, an Ontario Human Rights Commission board of inquiry "recently declared that same sex couples must be included in all employee benefit plans."[42]

In the Netherlands, although the Dutch Supreme Court has, thus far, refused to recognize a marriage right for homosexuals, it has acknowledged that refusing to allow homosexuals to marry might "put them at a legal disadvantage on such issues as inheritance, pension rights, and tax liability."[43] In response, the Dutch Government announced that it would "investigate the possibility of allowing people to enter a 'registered partnership' that would give them the same rights to one another's pensions and inheritances as married couples."[44] In addition, an opinion poll has

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37. *Will You Join Me in Civil Unionlock*, ECONOMIST, May 2, 1992, at 59.

38. Stephen Bindman, *Gay Couple Start Fight To Be Legally Married*, CALGARY HERALD, May 19, 1992, at A6.

39. Anthony Boadle, *Canada To Legislate Against Homosexual Discrimination*, Reuters, Dec. 10, 1992, *available in* LEXIS, News Library, Allnws File.

40. *Id.*

41. Claire Bernstein, *Why Society Finds It Difficult To Accept Same-Sex Couples*, TORONTO STAR, Aug. 5, 1993, at A11.

42. *Id.*

43. *Dutch Supreme Court Rules Against Homosexual Marriage*, Reuter Libr. Rep., Oct. 19, 1990, *available in* LEXIS, News Library, Allnws File.

44. *Netherlands Considers Giving Legal Rights to Homosexual Couples*, Reuter Libr. Rep., Nov. 1, 1990, *available in* LEXIS, News Library, Allnws File.

shown that 52.6% of Dutch citizens would allow homosexual marriages.[45]

Thus, although homosexuals have not been granted the right to marry in the above mentioned countries, substantial movements for the recognition of gay rights exist, and laws forbidding same-sex marriages are currently being challenged.

1. Sweden

Several European countries now permit same-sex couples to marry, or grant homosexual couples rights identical to those that married couples receive. Sweden, for example, passed legislation in 1987 that gives homosexuals the right to sign housing leases as couples, provides inheritance rights in the absence of a will, and regulates the distribution of property upon the termination of live-in relationships.[46] The Swedish law applies to both heterosexual and homosexual live-in sexual relationships.[47] More recently, Sweden's Social Welfare Board proposed a "registered partnership" that would provide co-habitating homosexuals with almost all rights created by legal marriage, except the right to adopt children.[48] Yet, the rights recognized in Sweden do not confer the status of marriage on homosexuals. Thus, the relationship between a U.S. citizen and a Swedish citizen would not create "spouse" status under the INA.

2. Denmark

Denmark, which first legalized adult homosexual acts in 1930,[49] has gone the furthest of any country in extending rights to homosexuals. In 1986, Denmark granted homosexuals the same rights of inheritance granted to married couples.[50] In 1989,

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45. *Id.*

46. *Sweden Approves Gay Rights Measure*, L.A. TIMES, June 5, 1987, at A15.

47. Eva Ahlberg, *Live-In Lovers in Sweden, Including Gays, Given Same Rights As Married Couples*, L.A. TIMES, Mar. 27, 1988, at A15.

48. *Marriage Rights Proposed for Swedish Homosexuals*, ORLANDO SENTINEL TRIB., June 19, 1990, at A6. The legislation was intended to encourage monogamy and limit AIDS. *Id.* The U.S. Congress has stated its intent to encourage this public policy as well. *Id.*

49. Michael Duggan, *Danish Parliament Debates Bill to Legalize Homosexual Marriages*, Reuter Libr. Rep., Mar. 16, 1988, *available in* LEXIS, News Library, Allnws File.

50. *Homosexuals Win Inheritance Rights in Denmark*, Reuters N. Eur. Service, May 30, 1986, *available in* LEXIS, News Library, Allnws File.

Denmark became the first country in the world to legalize same-sex marriage, providing homosexual couples almost the same rights as heterosexual couples and subjecting them to the same obligations.[51] Homosexuals in "registered partnerships" automatically inherit from each other, must support each other, are taxed as married couples, have the same access to social services as married couples, and must officially divorce to dissolve their relationships.[52]

To qualify for registration, the applicants must be of the same sex and must share the same address.[53] Bigamy is not permitted.[54] Registered partnerships with foreigners are permitted as well,[55] and homosexuals in registered partnerships have the same rights in immigration as married heterosexuals.[56] Although reducing the risk of AIDS was not the intent of the legislation, it was the expected result of the encouragement of "more stable relationships."[57] In the first three months after registered partnerships were legalized, 648 Danish homosexuals married.[58] By May 1992, 491 lesbian and 1400 gay couples had married.[59]

3. Norway

In 1993, Norway became the second country to permit homosexual marriages.[60] As in Danish same-sex marriages, Norwegian homosexuals may enter into registered partnerships that obligate the partners to support each other, allow inheritance rights and taxation privileges identical to those granted heterosexu-

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51. Isherwood, *supra* note 26. The law went into effect on October 1, 1989. Sheila Rule, *Rights for Gay Couples in Denmark*, N.Y. TIMES, Oct. 2, 1989, at A8.

Homosexuals in registered partnerships may not adopt children and their unions are not recognized by the state Lutheran Church. Isherwood, *supra* note 26. The prohibition on adoptions may be attributed to the government's fear that Third World countries would no longer make children available to Danish families for adoption, and not to any belief that homosexuals should not be allowed to raise children. *Id.*

52. *Id.*

53. *Id.*

54. *Id.*

55. *Id.*

56. Tim Pearce, *Denmark Legalizes Gay Marriages*, Reuters, May 26, 1989, *available in* LEXIS, News Library, Papers Allnws. At least one of the partners must be a resident Danish citizen. Rule, *supra* note 51.

57. Isherwood, *supra* note 26.

58. *More Than 600 Danish Homosexuals Marry Under New Law*, Reuters, Apr. 18, 1990, *available in* LEXIS, News Library, Allnws File.

59. Alex Duval Smith, *Blissfully Wedded to an Ideal*, GUARDIAN, May 8, 1992, at 72.

60. Smith, *supra* note 27.

al married couples, and permit legal dissolution of the relationships in the same manner by which heterosexuals dissolve their marriages.[61]

B. Effects of European Laws on the United States

The trend towards recognition of homosexual rights in other countries has implications for the United States. First, it demonstrates a global trend towards the recognition of equal rights for homosexuals. Second, it increases the likelihood that homosexual marriage will remain an issue in the United States, because American citizens may legally and validly marry Danish or Norwegian citizens of the same sex under those countries' laws. The following Section of this paper examines the nature of the right to marriage in the United States and the steps that states have taken towards recognizing permanent homosexual relationships.

III. THE INSTITUTION OF MARRIAGE

A. Marriage Is a Fundamental Right

In *Loving v. Virginia*,[62] the Supreme Court recognized that "marriage is a social relation subject to the State's police power."[63] Nevertheless, the Court also recognized marriage as a fundamental right entitled to special protection, stating that "[m]arriage is one of the 'basic civil rights of man,' fundamental to our very existence and survival,"[64] and that "[t]he freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men."[65] In *Zablocki v. Redhail*,[66] the Court stated that "recent decisions have established that the right to marry is part of the fundamental 'right

61. *Id.* As with registered partnerships in Denmark, homosexuals may not adopt children and are not entitled to church marriages. *Id.*

62. 388 U.S. 1 (1967) (Virginia's adoption of miscegenation statutes violated the Fourteenth Amendment's Due Process and Equal Protection Clauses).

63. *Id.* at 7.

64. *Id.* at 12.

65. *Id.*

66. 434 U.S. 374 (1978).

of privacy' implicit in the Fourteenth Amendment's Due Process Clause."[67]

These cases involved a heterosexual's right to marry; American courts have not been as willing to protect a homosexual's right to marry. For example, in *Singer v. Hara*,[68] where the male plaintiffs sued to compel the County Auditor to issue them a marriage license, Washington's Supreme Court held that the state's statutory prohibition against same-sex marriage did not violate the state's Equal Rights Amendment or the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution.[69]

In *Singer*, the court first interpreted its statute to exclude same-sex couples from marriage. Although the language of the statute provided the requirements for "persons" to marry within the state, the statutory language replaced prior language which had explicitly referred to males and females.[70] The court then rejected the claim that excluding same-sex couples from marriage violated the state's Equal Rights Amendment because the term "marriage" itself connotes the "union of one man and one woman";[71] thus, a same-sex relationship was not included within the definition of marriage, and the right was, therefore, denied. The court also determined that the statute did not violate the Equal Protection Clause of the Fourteenth Amendment. Because the statute was presumed constitutional, the court determined that the traditional definition of marriage as a relationship between a man and a woman was a rational basis for the statute.[72]

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67. *Id.* at 384. In *Zablocki*, the plaintiff claimed that a state statute requiring a resident to obtain court approval to marry if he had a minor child who was not in his custody and whom he was obligated to support violated the Fourteenth Amendment's Equal Protection Clause. The state claimed that its goal was to "establish a mechanism whereby persons with support obligations to children from prior marriages could be counseled before they entered into new marital relationships and incurred further support obligations." *Id.* at 388. Although "[c]ourt permission to marry was to be required," the state was supposed to grant permission automatically after counseling. *Id.* As no counseling was required or provided under the statute, the automatic grant of permission was, in reality, non-existent; thus, the state's interests did not justify the means chosen, and the statute violated the Equal Protection Clause. *Id.* at 388-89.

68. 522 P.2d 1187 (Wash. 1974).

69. *Id.*

70. *Id.* at 1189.

71. *Id.* at 1191-92.

72. *Singer*, 522 P.2d at 1196-97. The court declined to apply a strict scrutiny standard of review because it found that the statute did not discriminate against homosexuals. *Id.* at 1196. In addition, a definition of marriage that excluded homosexuals did not create a suspect classification. *Id.*

The state's compelling interest in regulating marriage is clear: a state can function only if it has citizens to govern, and children are (traditionally) the product of marriage, so marriage is necessary to produce more citizens for the state. This proposition is supported by *Singer*, which noted that the right to marry is granted because

> society as a whole views marriage as the appropriate and desirable forum for procreation and the rearing of children. This is true even though married couples are not required to become parents and even though some couples are incapable of becoming parents and even though not all couples who produce children are married. These are, however, exceptional situations. The fact remains that marriage exists as a protected legal institution primarily because of societal values associated with the propagation of the human race. Further, it is apparent that no same-sex couple offers the possibility of the birth of children by their union.[73]

Viewing marriage as the only appropriate forum for procreation and child rearing is both idealistic and unrealistic. Nearly one-fourth of all American households consist of children raised by a single parent, and almost one-fourth of new births are to unmarried women.[74] Numerous children are born to homosexual parents as well. There are nearly three million gay and lesbian parents in the United States, raising eight to ten million children in their households.[75] Thus, a large minority of parents are raising children—many by their own choice—outside the traditional institution of marriage.

In addition, by denying homosexual parents the right to marry, the state creates problems for itself and for those parents' children. Although each homosexual partner may consider him or herself a "parent" of the child, only the biological parent has a legal obligation to support the child. Thus, it is more likely that the child will have to depend on public financial support through welfare, creating an obligation for the government and fewer means of support for the child.

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73. *Id.* at 1195.

74. NAN D. HUNTER ET AL., THE RIGHTS OF LESBIANS AND GAY MEN: THE BASIC ACLU GUIDE TO A GAY PERSON'S RIGHTS 74 (3d ed. 1992).

75. EDITORS OF THE HARVARD LAW REVIEW, SEXUAL ORIENTATION AND THE LAW 119 (1990).

B. Homosexuals Are Entitled to the Same Right to Privacy as Heterosexuals

Courts might attempt to justify their denial of homosexuals' fundamental right to marry by claiming that the Supreme Court has found that homosexuals are not entitled to the right to privacy that protects heterosexuals. After all, if homosexuals do not have a right to engage in sexual conduct in the privacy of their own bedrooms, they have no reason to marry.

In *Griswold v. Connecticut*,[76] where the plaintiffs, who were employees of Planned Parenthood, were convicted of disseminating information about contraception and of prescribing contraception, the Court first recognized that married persons have a right to privacy in the intimate details of their relationship in the bedroom, emanating from the First, Third, Fourth, Fifth, and Ninth Amendments.[77] In *Eisenstadt v. Baird*,[78] where the plaintiff was convicted of the felony of dispensing contraception, the Court extended this right to single individuals, finding that

> the marital couple is not an independent entity with a mind and heart of its own, but an association of two individuals each with a separate intellectual and emotional makeup. If the right of privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.[79]

In *Bowers v. Hardwick*,[80] the Court declined to extend the fundamental right of privacy to homosexuals. Rather, the majority characterized the plaintiff's claim more narrowly as that of a fundamental right to engage in sodomy.[81] The Court rationalized that sodomy had been a crime in many states since the signing of the Constitution, and was still a criminal act in nearly half the states; thus, there was no fundamental right to engage in such conduct.[82]

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76. 381 U.S. 479 (1965).
77. *Id.* at 484.
78. 405 U.S. 438 (1972).
79. *Id.* at 453.
80. 478 U.S. 186, *reh'g denied* 478 U.S. 1039 (1986).
81. *Id.* at 190.
82. *Id.* at 192-94.

Justice Blackmun addressed this issue in his dissent. Attacking the majority's rationale, he compared the Court's treatment of the Georgia statute in *Bowers* to its treatment of the Virginia statute in *Loving*. In *Loving*, the Court also faced conduct outlawed by many states, but the Court ignored the tradition of illegality to find that the statute violated not only the Fourteenth Amendment's Equal Protection Clause but also the Due Process Clause, because it denied the Lovings the "freedom of choice to marry."[83] In *Bowers*, the Court could just as easily have held that the prohibition against sodomy intruded on the right to privacy in the bedroom, and could have found the statute unconstitutional on that basis.

Justice Blackmun would have continued the logical trend that began with *Griswold* and continued with *Eisenstadt* by recognizing the fundamental right at stake not as one to engage in sodomy, but as "the right to be let alone."[84] He would have protected the plaintiff's interest in *Bowers* by looking to "the basic reasons why certain rights associated with the family have been accorded shelter under the Fourteenth Amendment's Due Process Clause."[85] Justice Blackmun found that certain rights are protected because they are central to an individual's life, and because "a person belongs to himself and not others nor to society as a whole."[86]

Justice Blackmun enumerated several protected interests: the right to marry, "because marriage is an association that promotes a way of life, . . . a harmony in living . . . a bilateral loyalty"; the decision whether or not to have a child, "because parenthood alters so dramatically an individual's self-definition"; and the family, "because it contributes so powerfully to the happiness of individuals."[87] When courts protect these interests, they protect "intimate human associations,"[88] the same interest at stake in *Bowers*.

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83. *Id.* at 210 (Blackmun, J., dissenting). This is also comparable to the decision in Roe v. Wade, 410 U.S. 179, *reh'g denied* 410 U.S. 959 (1973), where the Court recognized a fundamental right to abortion, even though abortion was also illegal at that time.

84. *Bowers*, 478 U.S. at 199 (Blackmun, J., dissenting).

85. *Id.* at 204.

86. *Id.*

87. *Id.* at 205.

88. LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 1423 (2d ed. 1988).

Justice Blackmun focused on the importance of sexual intimacy. He noted that it is "a sensitive, key relationship of human existence, central to family life, community welfare, and the development of human personality," and that

> the fact that individuals define themselves in a significant way through their intimate sexual relationships with others suggests . . . that there may be many "right" ways of conducting those relationships, and that much of the richness of the relationship will come from the freedom an individual has to choose the form and nature of these intensely personal bonds.[89]

Justice Blackmun also recognized that "a necessary corollary of giving individuals freedom to choose how to conduct their lives is acceptance of the fact that different individuals will make different choices."[90]

In examining the majority's decision, Justice Blackmun found that the majority failed to recognize all individuals' fundamental interest "in controlling the nature of their intimate associations with others," a conclusion that logically follows the Court's holdings in *Griswold* and *Eisenstadt*. This interest was implicated particularly in *Bowers*, because the plaintiff's objectionable behavior occurred in his home, a place protected specifically by the Fourth Amendment.[91]

Justice Blackmun would also have found that the plaintiff's interest fell within "a certain private sphere of individual liberty" with which the government may not interfere.[92] He noted that the Court protects privacy in two contexts: privacy related to decisions that are "properly for the individual to make," and privacy related to "certain places without regard for the particular activities in which the individuals who occupy them are engaged."[93] "Indeed," Justice Blackmun wrote, "the right of an individual to conduct intimate relationships in the intimacy of his or her own home seems to me to be the heart of the Constitution's protection of privacy."[94] In fact, "the relevant question is not

89. *Bowers*, 478 U.S. at 205.
90. *Id.* at 205-06.
91. *Id.* at 206-07.
92. *Id.* at 203.
93. *Id.* at 204.
94. *Bowers*, 478 U.S. at 208.

what Michael Hardwick was doing in the privacy of his own bedroom, but what the State of Georgia was doing there."[95]

Justice Blackmun's opinion reflects the idea that the "individual's 'right of *decision*' about procreation,"[96] and not procreation itself, is what is protected by the constitutional principle of individual autonomy in *Griswold* and *Eisenstadt*.

> In each case, the Court protected the decision to engage in sex *without* bearing or begetting a child. These holdings thus mandated heightened scrutiny not of state restrictions on procreative sex, but of restrictions on recreational or expressional sex—sex solely as a facet of associational intimacy—whether between spouses or between unmarried lovers.[97]

Thus, the issue properly at stake in *Bowers* was not whether sodomy is constitutionally protected, "but whether private, consensual, adult sexual acts partake of traditionally revered liberties of intimate association and individual autonomy."[98] The Court has previously recognized these as protected interests and, had it characterized Hardwick's claim as such, it probably would have protected Hardwick's interest as well. Accordingly, if the Court in *Bowers* had characterized the issue as whether Hardwick's right to engage in sexual conduct irrespective of the decision whether to bear or beget a child was violated, courts would have significantly less justification today for denying same-sex couples the right to marry.

C. A Marriage That Is Valid Where It Is Celebrated Is Valid Everywhere

It is a well-established principle that if a marriage is valid in the place where it is celebrated, the marriage will be valid in any state unless it is contrary to strong public policy,[99] for example, if it is incestuous[100] or if it is between persons of the same

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95. TRIBE, *supra* note 88, at 1428.
96. *Id.* at 1423 (emphasis in original).
97. *Id.* (emphasis in original).
98. *Id.* at 1428.
99. *See, e.g.*, RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 283(2) (1971) (stating that "a marriage which satisfies the requirements of the state where the marriage was contracted will everywhere be recognized as valid unless it violates the strong public policy of another state which had the most significant relationship to the spouses and the marriage at the time of the marriage").
100. Fisher v. Fisher, 165 N.E. 460 (N.Y. 1929) (recognizing a marriage performed under the laws of Washington, D.C. as valid in the State of New York).

sex.[101] A number of recent court decisions, however, have held as valid marriages those that are incestuous, or between under-age or genetically same-sex parties.[102] Because states are becoming more lenient in their recognition of marriages that were formerly strictly against public policy, states should also be willing to recognize same-sex marriages that are valid in other countries, or may eventually be valid in a number of states.

1. Incestuous Marriages Have Been Held Valid

Traditionally, a marriage between parties who are related to each other by a certain degree of kinship is void as incestuous. For example, in *Singh v. Singh*,[103] the Connecticut Supreme Court ruled that, under Connecticut's state statute, "a marriage between persons related to one another as half-uncle and half-niece is void"[104] when the marriage was celebrated in Connecticut.

Not all states adopt this position, however. For example, New Mexico's Court of Appeals held in dictum that an incestuous marriage that is valid in the jurisdiction where it was celebrated would be contrary to public policy, but would not offend "a sufficiently strong public policy to outweigh the purposes served by the rule of comity."[105] Similarly, in *In re Estate of Loughmiller*,[106] the Supreme Court of Kansas recognized a Colorado marriage between first cousins, finding that "a first cousin marriage validly contracted elsewhere is [not] odious to the public policy of" Kansas.[107] The court noted three reasons for forbidding incestuous marriage: (1) its prohibition under ecclesiastical law; (2) the fear of the weakening of the population due to inbreeding; and (3) "the sociological consequences of competition

101. Incestuous marriages and marriages between underage parties or between same-sex parties have traditionally been void *ab initio*; they are annulled and, in effect, never existed. HOMER H. CLARK, 1 THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES 142-73 (2d ed. 1987). Marriages with less significant defects—for example, those where one partner is impotent or where the marriage was induced by fraud—are not void, but voidable at the offended partner's option. *Id.* at 176, 191.

102. *See infra* notes 103-17 and accompanying text.

103. 569 A.2d 1112 (Conn. 1990).

104. *Id.* at 1121.

105. Leszinske v. Poole, 798 P.2d 1049, 1055, *cert. denied*, 110 N.M. 533 (1990).

106. 629 P.2d 156 (Kan. 1981).

107. *Id.* at 161.

for sexual companionship among family members."[108] Nevertheless, the court found that these reasons are less compelling today than they were when the statute forbidding such marriages was enacted; thus, it held that the marriage between the first cousins was valid.[109]

Homosexual marriages have also been considered to be against public policy for two reasons. First, traditional prohibitions against sodomy are implicated in homosexual marriages. Second, same-sex marriages, unlike heterosexual marriages, do not give rise to a relationship capable of procreation. Just as the policy reasons against incestuous marriages are less compelling today, so are those reasons against same-sex marriages; many states have repealed the prohibitions on sodomy, and scientific and legal advances have made it possible for same-sex couples to have and raise children. If a state can recognize a valid marriage celebrated in another state between parties so related as to make the marriage incestuous, it should also recognize a valid same-sex marriage celebrated in another country between people of the same sex.

2. Marriages Between Under-Age Parties Have Been Held Valid

Marriages between parties below the age of consent have traditionally been held void unless the parents or the court gave their consent. Nevertheless, the Court of Special Appeals of Maryland has held that the marriage of a sixteen-and-one-half-year-old male to an eighteen-year-old female was valid, even though the parties lied to obtain the marriage license and did not have parental consent.[110] Other courts have reached similar results.[111]

Marriages to which an under-age person is a party usually require either parental or judicial consent to be valid, because the

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108. *Id.* at 158.

109. *Id.* at 161.

110. Picarella v. Picarella, 316 A.2d 826 (Md. 1974).

111. *See, e.g.,* Browning v. Browning, 130 P. 852 (Kan. 1913) (refusing to annul a marriage entered into by a minor in violation of a statute requiring consent); State v. Ward, 28 S.E.2d 785 (S.C. 1944) (upholding the marriage of underage parties); *Ex parte* Hollopeter, 100 P. 159 (Wash. 1909) (holding valid the marriage of an underage girl who had reached the common-law age of consent, even though her parents had not consented to the marriage).

state has a legitimate, if not compelling interest in protecting minors. In contrast, parties to same-sex marriages, if they have reached the age of consent, are responsible for their decision-making and do not require governmental supervision. The government, therefore, has a much weaker interest, if any at all, in protecting such parties. Thus, courts should be more willing to recognize same-sex marriages that are valid where they are celebrated.

3. Marriages Between Parties Who Are Genetically the Same Sex have Been Held Valid

At least one court has recognized a marriage between parties who were genetically the same sex. In *M.T. v. J.T.*,[112] New Jersey's Superior Court held that a man who had a sex-change operation so that he was physically female, and who thought of himself as female, had the "capacity to enter into a valid marriage relationship with a person of the opposite sex."[113]

Because *M.T. v. J.T.* was decided by a state court, only New Jersey is bound by the court's holding.[114] Nevertheless, the decision is of great importance to same-sex partners seeking legal sanction for their relationships because it counters the reasoning of the Washington court in *Singer v. Hara*.[115] An important basis for the decision in *Singer* was the idea that states permit marriage because it is the best atmosphere for procreation and raising children, regardless of whether or not an opposite-sex couple intends or is able to have children.[116]

The New Jersey court's decision in *M.T. v. J.T.* suggests that the potential for children resulting from a marriage and being raised in the traditional atmosphere of one male and one female parent is not dispositive of the marriage's validity. Children cannot result naturally from the union of two people—like the

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112. 355 A.2d 204, *cert. denied*, 364 A.2d 1076 (N.J. 1976).

113. *Id.* at 211.

114. *See In re* Declaratory Relief for Ladrach, 513 N.E.2d 828 (Ohio 1987). The Ohio probate court explicitly rejected the "liberal posture" adopted in New Jersey and held that Ohio law provided no authority "for the issuance of a marriage license . . . [for] a marriage between a post-operative male to female transsexual person and a male person." *Id.* at 832.

115. 522 P.2d 1187 (Wash. 1974). *See supra* notes 60-64 and accompanying text.

116. *See* discussion *supra* note 73 and accompanying text (discussing *Singer*, 522 P.2d at 1195).

couple in *M.T. v. J.T.*—who are genetically of the same sex. Although the New Jersey court based its decision, in part, on the transsexual's psychological belief that he was female,[117] no operation can change the fact that he was a genetic male who could only maintain external female physical characteristics through surgery and the ingestion of female hormones. In fact, the marriage in *M.T. v. J.T.* was a marriage of a same-sex couple, and any children that the couple might raise would be raised by two men, although one would present himself as a female.

E. Some Municipalities and Courts Grant Homosexuals Rights in Recognition of Permanent, Committed Homosexual Relationships

Some municipalities and state courts recognize that the traditional definition of family as persons related by blood, marriage, or adoption[118] is no longer sufficient. Thus, these municipalities and courts grant homosexuals rights that are usually reserved for heterosexuals.

1. Domestic Partnerships

Domestic partnerships permit unmarried individuals—heterosexual and homosexual—to register their partners so that the partners receive the same benefits that a spouse would receive by valid marriage.[119] Domestic partnerships may be offered by individual businesses or by municipalities, which may provide partners with any benefits they choose. Usually, these benefits include health insurance benefits in the case of businesses, and such rights as disability, illness, or bereavement leave, or hospital visitation in the case of municipalities.[120] The only limitation is that the benefits must be those that the business or municipality is authorized to provide itself.[121] This means that

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117. M.T. v. J.T., 355 A.2d at 211.

118. Moore v. City of East Cleveland, 431 U.S. 494, 498 (1976).

119. Robert L. Eblin, Note, *Domestic Partnership Recognition in the Workplace: Equitable Employee Benefits for Gay Couples (and Others)*, 51 OHIO ST. L.J. 1067, 1069 (1990).

120. Craig A. Bowman & Blake M. Cornish, Note, *A More Perfect Union: A Legal and Social Analysis of Domestic Partnership Ordinances*, 92 COLUM. L. REV. 1164, 1194-95 (1992).

121. *Id.* at 1164.

registering a domestic partnership will not make the partners eligible for federal benefits, such as social security or tax deductions, or any other benefits that the individual business or municipality cannot provide.[122] All that is required to register a partnership is for the parties to meet the requirements established by the business or municipality, such as the length of time the parties have been together, and the registration of the partnership.[123]

Several municipalities in the United States have enacted legislation recognizing domestic partnerships. For example, San Francisco enacted domestic partnership legislation by popular vote in May, 1989.[124] The ordinance applies to heterosexuals and homosexuals "who share a residence and living expenses" and have "an intimate . . . relationship of mutual caring," and requires a $35 registration fee.[125] The domestic partners must be unmarried at the time of registration, and they must submit formal notification at the end of the relationship.[126] In addition, partners may not register a new relationship until six months after the termination of a previously registered relationship.[127] Rights granted to registered partners by this legislation include hospital visits.[128] This right is significant for homosexuals with a partner who has AIDS.

San Francisco was the first U.S. city to enact such legislation, but three other cities in California—Santa Cruz, Berkeley, and West Hollywood—previously required employers to extend spousal benefits (e.g., health care) to unmarried partners.[129] West Hollywood extends spousal benefits to the partners of city employees, gives partners hospital and jail visitation rights, and forbids landlords from evicting a tenant whose "domestic partner moves

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122. *Id.* at 1203.

123. *Id.* at 1192-94.

124. *Denmark To Legalize Homosexual Marriages*, CHI. TRIB., May 26, 1989, at 4; Dean Lokken, *San Francisco Homosexuals Line Up To Declare Undying Love*, Reuters, Feb. 14, 1991, *available in* LEXIS, News Library, Allnws File.

125. *Something Borrowed, Something Pink*, ECONOMIST, June 3, 1989, at 30.

126. *Id.*

127. *Id.*

128. *Id.*

129. *Id.* Most people who benefitted from these laws, in effect, were unmarried heterosexual couples. *Id.*

in" with him or her.[130] Laguna Beach, California, also has a domestic partnership law that gives domestic partners rights that are crucial to those enduring their partners' illness: power of attorney in healthcare matters and in disposing of personal effects upon death.[131]

California is not the only state where domestic partnership legislation has been enacted. Seattle's Commission for Lesbians and Gays drafted a proposal for domestic partnership legislation that would permit homosexuals to register their relationships.[132] New York City has also passed domestic partnership legislation.[133] In New York, registration of a relationship with the city's personnel department requires that a couple first live together for one year and that they "attest that they have a 'close and committed personal relationship involving shared responsibilities.'"[134] Registered partners are entitled to bereavement leave.[135] In New York, even without the formality of a registered partnership, partners in long-term homosexual relationships have the same rights as surviving spouses to take over rent-stabilized apartments when their partners die.[136]

IV. A STATE-APPROVED HOMOSEXUAL MARRIAGE MAY QUALIFY UNDER THE IMMIGRATION AND NATIONALITY ACT

Under the second prong of the *Adams* test for determining whether a marriage will be recognized for immigration purposes, the state-approved marriage must qualify under the INA.[137] Because Congress has plenary power with regard to immigration

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130. Kathleen Kelleher, *Gay Couple Challenge State Laws on Marriage*, L.A. TIMES, Apr. 21, 1993, at B3.

131. *Id.*

132. Elizabeth Rhodes, *New Ties That Bind—Same-Sex Couples Challenge the System To Gain Legal Recognition of Their Commitments to Each Other*, SEATTLE TIMES, July 21, 1991, at K1.

133. Walter Isaacson, *Should Gays Have Marriage Rights? On Two Coasts, the Growing Debate Produces Two Different Answers*, TIME, Nov. 20, 1989, at 101.

134. *Id.*

135. *Id.*

136. Braschi v. Stahl, 544 N.Y.S.2d 784 (1989). In *Brashci*, the Court of Appeals of New York held that "family," for the purposes of inheritance of rent-stabilized apartments, includes "two adult lifetime partners whose relationship is long term and characterized by an emotional and financial commitment and interdependence." *Id.* at 788-89. Thus, if Braschi could prove that he and his partner had such a relationship, he could inherit the rent-stabilized apartment that his now-deceased partner had leased for years. *Id.*

137. *Adams II*, 673 F.2d at 1038.

matters, "the intent of Congress governs the conferral of spouse status under section 201(b) [of the INA], and a valid marriage is determinative only if Congress so intends."[138] Yet, Congressional intent on the issue of whether a same-sex marriage that is valid under state law confers spouse status under the amended INA is unclear. The following sections will analyze Congress' intent in light of current circumstances. Congress' plenary power in immigration will be discussed, as will the qualifications for spouse status under the INA. Then, the amendment of the INA and the effect it has on the *Adams* decision will be evaluated.

A. Congress' Plenary Power in Immigration

"The power to exclude aliens is 'inherent in sovereignty, necessary for maintaining normal international relations and defending the country against foreign encroachments and dangers—a power to be exercised exclusively by the political branches of government.'"[139] Thus, "the Court without exception has sustained Congress' 'plenary power to make rules for the admission of aliens and to exclude those who possess those characteristics which Congress has forbidden.'"[140] Because Congress has plenary power in immigration, "the decisions of Congress are subject only to limited judicial review."[141] Therefore, courts must examine Congressional intent to interpret legislation pertaining to immigration.

B. Who Qualifies As a Spouse Under the INA?

Under current U.S. law, the number of immigrants who are granted entry into the United States is limited in several ways. Certain qualifications, including the status of being the spouse of a U.S. citizen, facilitate foreigners' entry.[142] Yet, the law does not clearly define which persons qualify for "spouse" status.[143]

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138. *Id.* at 1039.

139. Kleindienst v. Mandel, 408 U.S. 753, 765 (1972).

140. *Id.* at 775, *citing* Boutilier v. United States I.N.S., 387 U.S. 118, 123 (1967).

141. *Adams II*, 673 F.2d at 1041.

142. 8 U.S.C. § 1151(b)(2)(A)(i) (Supp. IV 1992).

143. 8 U.S.C. § 1101(a)(35) (1988). Section 1101(a)(35) states that the term "spouse" does not include "a spouse, wife, or husband by reason of any marriage ceremony where the contracting parties thereto are not physically present in the presence of each other, unless the marriage shall have been consummated." This does not provide guidance for the situation where two people of the same-sex have married in each others' presence.

Thus, the courts must determine who qualifies as a spouse for immigration purposes.

1. The INA Before the 1990 Amendment

In *Adams*, the court examined the INA to determine whether Congress intended to qualify homosexual spouses as spouses under the Act.[144] At the time the court decided *Adams*, the INA required exclusion of "aliens afflicted with psychopathic personality, or sexual deviation, or a mental defect."[145] This Section has traditionally been interpreted to exclude homosexuals; before the term "sexual deviation" was added to the Act, the term "psychopathic personality" was interpreted to include "homosexuals and sex perverts."[146]

The Ninth Circuit did not question the constitutionality of categorically excluding homosexuals in *Adams*. Shortly after *Adams* was decided, however, the U.S. District Court for the Northern District of California ruled that the policy of excluding homosexuals was unconstitutional.[147] The court rationalized that there was no "facially legitimate and bona fide reason" for the categorical exclusion, for medical authorities no longer recognized "homosexuality per se as a sexual deviation, a mental disorder, or a mental or medical illness of any type."[148]

2. Amendment of the INA

Congress subsequently amended the INA so that homosexuals are no longer excluded from immigration. In his statement proposing the Amendment, Senator Alan Cranston suggested that he agreed with the California district court's finding that the policy of excluding homosexuals was unconstitutional.[149] He focused on the discriminatory nature of the exclusionary provision, asserting that the provision "attempts to use private sexual orientation as a

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144. *Adams II*, 673 F.2d at 1040.

145. 8 U.S.C. § 1182(a)(4) (1964 & Supp. II 1967).

146. Quiroz v. Neelly, 291 F.2d 906, 907 (1961). *See also* S. REP. No. 1137, 82d Cong., 2d Sess., at 9, H.R. REP. No. 1365, 2d Cong., 2d Sess., *reprinted in* 1952 U.S.C.C.A.N. 1653, *cited in* Boutilier v. U.S.I.N.S., 387 U.S. 118, 121-22 (1967).

147. Lesbian/Gay Freedom Day Comm., Inc. v. U.S.I.N.S., 541 F. Supp 569, 586 (1982), *aff'd*, Hill v. United States I.N.S., 719 F.2d 1470 (9th Cir. 1983).

148. *Id.*

149. Amending Section 212(a)(4) of the Immigration and Nationality Act, 131 CONG. REC. S196 (1985) (statement of Sen. Cranston).

criterion for judging who does and who does not qualify for admission to the United States," and that the "[a]doption of [the amendment] will end a form of discrimination which has no valid scientific or medical basis and which violates traditional American respect for the privacy and dignity of an individual."[150] Further, Senator Cranston expressly stated that the amendment "is intended to make clear that sexual orientation alone cannot be the ground for denying entry to aliens wishing to visit or seeking to immigrate to the United States."[151]

The Amendment removed sexual preference as a ground for excluding persons attempting to immigrate to the United States, largely because the scientific grounds for classifying homosexuals as "psychopathic personalities" have been discredited and are no longer accepted in the scientific/medical community. The legislative history of the Amendment explains the reasons for repealing the provision excluding homosexuals:

> Not only is this provision out of step with current notions of privacy and personal dignity, it is also inconsistent with contemporary psychiatric theories. When this provision was adopted, homosexuality was viewed as a form of mental illness. However, in 1973, the American Psychiatric Association determined that homosexuality is not a mental disorder. Subsequently, in 1979, the Surgeon General determined that the [Public Health Service] could no longer issue medical certificates that an alien was homosexual, since homosexuality is not a medical condition. . . . To put an end to this unfairness Congress must repeal the "sexual deviation" ground. Therefore, in order to make it clear that the United States does not view personal decisions about sexual orientation as a danger to other people in our society, the bill repeals the "sexual deviation" exclusion ground.[152]

This declaration states that Congress no longer intends to exclude homosexual immigrants from the United States and, further, finds that individuals' decisions about sexuality cause no risk to others. Consequently, much of the court's rationale in *Adams* no longer has a legal basis.

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150. *Id.*
151. *Id.*
152. H.R. REP. No. 723(I), 101st Cong., 2d Sess., *reprinted in* 1990 U.S.C.C.A.N. 6736.

3. The *Adams* Court's Rationale is Undermined

In *Adams*, the court concluded that it was "unlikely that Congress intended to give homosexual spouses preferential admission treatment . . . when, in the very same amendments adding that section, it mandated their exclusion. Reading these provisions together, we can only conclude that Congress intended that only partners in heterosexual marriages be considered spouses under [the Act]."[153] The repeal of the exclusionary provision substantially undermines this interpretation of the INA. Consequently, this rationale is no longer valid to justify the non-recognition of same-sex spouses for immigration purposes.

The court also based its decision on the legislative definition of the word "spouse."[154] The court concluded that Congress did not intend for same-sex spouses to be "spouses" within the INA for three reasons: (1) because Congress has defined "spouse" to require that the parties be present at their marriage ceremony or that they consummate the marriage;[155] (2) because "valid marriages entered into by parties not intending to live together as husband and wife are not recognized for immigration purposes";[156] and (3) because the INS "has interpreted the term 'spouse' to exclude a person entering a homosexual marriage."[157] In addition, the court noted that Congress had not stated anywhere that the term "spouse" was meant to include a person of the same-sex as the other party to the marriage, and that the term "spouse," therefore, should be given its ordinary, every-day meaning.[158]

None of these reasons justifies the court's refusal to interpret a same-sex partner as a "spouse" within the meaning of the INA. The first two reasons reflect the fear that parties will enter into marriages solely to enable the foreign spouse to gain legal entry into the United States. The Congressional aim is to prevent sham marriages, not to prevent same-sex partners of valid marriages from obtaining the full rights to which they are entitled as a married couple. Thus, these justifications are not relevant to

153. *Adams II*, 673 F.2d at 1040-41.
154. *Id.* at 1039-40.
155. *Id.* at 1039.
156. *Id.* at 1040.
157. *Id.*
158. *Adams II*, 673 F.2d at 1040.

determine whether same-sex spouses should be considered "spouses" under the INA.

The justification based on the INS' interpretation that "spouse" excludes same-sex partners is also weakened by the Amendment to the INA. The INS originally interpreted the Act as excluding homosexuals at a time when Congress intended to exclude them from the United States. Nevertheless, while the American Psychiatric Association and the Surgeon General were in the process of reevaluating the status of homosexuality as a mental defect, but before they determined that homosexuality was not such a defect, the INS changed its procedures to allow homosexuals into the country.[159] This suggests that the INS would also change its definition of the word "spouse," based on the Congressional Amendment to the INA.

Additionally, if a state determines that a same-sex marriage is valid, the word "spouse" would include a same-sex partner in its common, every-day meaning. Thus, the *Adams* court's justifications for finding that Congress did not intend for same-sex spouses to qualify under the INA are substantially weakened by the Amendment to the Act.

C. What the Court Should Do in the Absence of Clear Legislative Intent

Although Congress has not explicitly stated that it intended to recognize same-sex spouses as "spouses" within the meaning of the INA, it has repealed the law that the court used to justify denying same-sex spouses this recognition. This repeal was based on the realization that the factual basis for the law—the belief that homosexuals have psychopathic personalities and that homosexuality is a sexual deviation—was incorrect.[160] Thus, when faced with a similar situation, a court must reinterpret Congressional intent to determine whether a same-sex spouse to a marriage that is recognized as valid by a state would qualify for "spouse" status under the INA. In light of the repeal of the exclusionary provision, the court should consider the U.S. citizen's right to the equal protection of the laws to recognize the same-sex spouse of a valid marriage as a spouse for immigration purposes.

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159. Hill v. United States I.N.S., 775 F.2d 1037, 1039 (1985).

160. *See supra* notes 149-52 and accompanying text.

1. The Federal Government Is Bound by the Equal Protection Clause

The Equal Protection Clause of the Fourteenth Amendment is not binding on the federal government; it requires that the states do not deny their citizens the equal protection of the laws.[161] Nevertheless, the process of "reverse incorporation" makes the Equal Protection Clause binding on the federal government through the Fifth Amendment's Due Process Clause.[162] Therefore, the federal government is subject to the same constraints of the Equal Protection Clause as a state government; the federal government may not deprive its citizens of the equal protection of the laws.

2. A Homosexual Has an Equal Protection Claim If His Same-Sex Spouse Is Denied "Spouse" Status Under the INA

A party has an equal protection claim if he faces discrimination resulting from an act by law.[163] Such is true in the case of a U.S. citizen who seeks to bring his foreign same-sex spouse into the United States on the basis of the partner's status as a spouse. Under the *Adams* decision, the U.S. citizen faces discrimination because his spouse will not be considered a "spouse" for immigration purposes, even though the foreign spouse of a heterosexual person would be considered a "spouse." Furthermore, this discrimination results from the immigration law passed by Congress and interpreted by the courts to exclude same-sex spouses; thus, it meets the requirement that the discriminatory action be governmental. A U.S. citizen in this situation would, therefore, have a valid equal protection claim.

3. A Homosexual's Equal Protection Claim Should Receive Heightened Scrutiny

a. Excluding Same-Sex "Spouses" Is Intentional Discrimination

An equal protection claim is entitled to heightened scrutiny review if the body passing the law had the intent to discriminate

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161. U.S. CONST. amend. XIV, § 1.
162. Fullilove v. Klutznick, 448 U.S. 448 (1980).
163. Strauder v. West Virginia, 100 U.S. 303 (1879).

and the discrimination affects a suspect or quasi-suspect class or a fundamental right.[164] When a court refuses to recognize a same-sex spouse, there is intent to discriminate because the denial of "spouse" status is based solely upon sexual preference. The gross statistical disparity in the number of same-sex versus the number of heterosexual spouses who qualify for immigration reflects the intent to discriminate—no same-sex spouses are granted "spouse" status. Consequently, the discrimination against homosexuals is more than an incidental result of discrimination based on a characteristic other than sexual preference; rather, it discriminates against homosexuals specifically.

b. Homosexuals Should Be Considered a Suspect or Quasi-Suspect Class

In *Watkins v. U.S. Army*,[165] the court found that homosexuals meet the requirements to be considered a suspect class, against whom discriminatory legislation must be accorded strict scrutiny review.[166] Although this finding was overturned on appeal, homosexuals should, nevertheless, be considered a suspect or quasi-suspect class. To be considered a suspect class, a group must meet the indicia of suspectness that the Supreme Court evaluates in finding certain groups to be suspect.[167] Several such factors have been recognized.

The first factor is a history of discrimination against the group.[168] Homosexuals have historically faced extensive discrimination. In *Watkins*, the court noted that "homosexuals have historically been the object of pernicious and sustained hostility,"[169] and that "lesbians and gays have been the object of some of the deepest prejudice and hatred in American society."[170] Furthermore, discrimination is reflected in the history of the INA itself—the notion that being homosexual means that a person has

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164. Kadrmas v. Dickinson Pub. Sch., 487 U.S. 450, 457 (1988).

165. 847 F.2d 1329 (9th Cir. 1988), *opinion withdrawn on reh'g*, 875 F.2d 699 (9th Cir. 1989), *cert. denied*, 498 U.S. 957 (1990).

166. *Id.* at 1349.

167. Richmond v. J.A. Croson Co., 488 U.S. 469, 553 (1989).

168. Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307 (1976).

169. *Watkins*, 847 F.2d at 1345, *citing* Rowland v. Mad River Local Sch. Dist., 470 U.S. 1009 (1985).

170. *Id.*, *citing* High Tech Gays v. Defense Industrial Security Clearance Office, 668 F. Supp. 1361 (N.D. Cal. 1987).

a "psychopathic personality" or "mental disease or defect."[171] Another, more current example of discrimination against homosexuals is the military policy of refusing to allow homosexuals to serve in the armed forces. Although "mitigated" today by the "don't ask, don't tell" policy, which allows homosexuals to serve only if they keep their sexual preference secret, the discriminatory nature of the military policy is apparent.

The second factor that the Supreme Court examines to determine whether a group qualifies as a suspect class is whether the group is politically powerless, so that the group lacks an effective voice or representation in the political process.[172] Traditionally, this factor has required a determination that the group is a "discrete and insular minority."[173]

Homosexuals meet this standard. It is true that gays have never categorically been denied the right to vote, as has been the case with other groups found to be suspect classes. Another component of political powerlessness, however, is the ineffectiveness of the representation of the group's interests achieved through the exercise of the right to vote. In this respect, homosexuals' votes alone are insufficient to adequately represent their interests: "even if the majority of gay and lesbian people suddenly opened up about their sexuality, because of both moral disapproval of homosexuality and the fact that gay men and lesbians constitute a minority of the population, discriminatory practices would probably continue."[174] For example, the voters of Colorado passed an initiated amendment to the Colorado Constitution which forbade all state agencies from enacting any legislation which was protective of homosexuals.[175] The vocal opposition of homosexuals in Colorado was insufficient to prevent the passing of this amendment.[176]

In addition, "most gay men and lesbians are not likely to risk publicly calling for changes in policies . . . [b]ecause people who

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171. *See supra* notes 149-52 and accompanying text.

172. Plyler v. Doe, 457 U.S. 202, 217 n.14, *reh'g denied*, 458 U.S. 1131 (1982).

173. *Watkins*, 847 F.2d at 1348, *citing* United States v. Carolene Prod., 304 U.S. 144, 152-53 n.4 (1938).

174. SEXUAL ORIENTATION AND THE LAW, *supra* note 75, at 57.

175. *Evans v. Colorado*, 1993 WL 518586, at 1 (Colo. Dec. 14, 1993).

176. The Colorado District Court found that the amendment violated the "fundamental right to participate equally in the political process" and, consequently, found the amendment to be unconstitutional. *Id.* at 13.

openly declare their homosexuality face harassment, loss of employment, and social ostracism."[177] Furthermore, very few people elected to public office are openly homosexual, because acknowledging their sexual preference and exposing themselves to societal prejudice significantly reduces homosexuals' chances of election.[178] Thus, homosexuals are politically powerless because their interests are inadequately represented by their votes.

The third factor that the Supreme Court examines is the immutability of the characteristic that defines the group.[179] Although the immutability of sexual preference has not been absolutely determined, scientific research suggests that homosexuality is immutable because sexual preference is not something that people are able to change.[180] For example, therapists' attempts to substitute heterosexual activity for their patients' homosexual activity have had only limited success, and have led to the conclusion that homosexuality is not an illness[181] that can be treated and cured.

Additionally, the *Watkins* court noted that the Supreme Court has not always required immutability to designate a class as suspect.[182] In other cases, courts have not required a strict definition of immutability.[183] For example, a light-skinned black person might pass for white or have pigment injections to achieve that appearance.[184] The Watkins court concluded that immutability requires only that changing the trait "would involve great difficulty, such as requiring a major physical change or a traumatic change of identity."[185] If the trait at issue is "so central to a person's identity that it would be abhorrent for government to penalize a person for refusing to change" the trait, it is immuta-

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177. *Id.*

178. Note, *The Constitutional Status of Sexual Orientation: Homosexuality as a Suspect Classification*, 98 HARV. L. REV. 1285, 1304 n.96 (1985) [hereinafter *The Constitutional Status of Sexual Orientation*].

179. Frontiero v. Richardson, 411 U.S. 677, 686 (1973).

180. SEXUAL ORIENTATION AND THE LAW, *supra* note 75, at 57-58.

181. Coleman, *Changing Approaches to the Treatment of Homosexuality*, *in* HOMOSEXUALITY: SOCIAL, PSYCHOLOGICAL, AND BIOLOGICAL ISSUES 81-88 (W. Paul et al. eds., 1982), *cited in* SEXUAL ORIENTATION AND THE LAW, *supra* note 75, at 58.

182. *Watkins v. U.S. Army*, 847 F.2d 1329, 1347.

183. *Id.*

184. *Id.*

185. *Id.*

ble.[186] Therefore, homosexuals' inability to change their sexual preference would meet the immutability requirement.

A fourth factor that the Supreme Court examines to determine whether a class is suspect is whether the discrimination against the group is grossly unfair or otherwise inconsistent with the dictates of the Equal Protection Clause.[187] To make this determination, the Court looks at whether the class is defined by a trait unrelated to the "ability to perform or contribute to society,"[188] in addition to factors one and three above (discrimination and immutability).[189] Clearly, sexual orientation does not affect a person's ability to contribute to society. For example, homosexual couples are among the highest income-earners: "[g]ay men have emerged as one of the richest and least-tapped markets in America."[190]

Because homosexuals meet the indicia of suspectness required for categorization as a suspect class, and because the discrimination against them is intentional, a homosexual's claim that he is being denied the equal protection of the laws because his spouse from a valid marriage is not considered a "spouse" for purposes of immigration should receive strict scrutiny review. The Supreme Court is reluctant, however, to recognize new classifications as suspect. Consequently, where the Court has overtly or covertly identified certain quasi-suspect classes, discrimination against these classes receives intermediate, but not strict scrutiny.[191] This level of scrutiny is less demanding than the strict scrutiny standard applied to true suspect classes, but more demanding than the "basic requirement of minimum rationality" applied to non-suspect classes.[192] In *High Tech Gays v. Defense Industrial Security Clearance Office*,[193] the District Court for the Northern District of California found gays to be a quasi-suspect class, and invalidated the government's policy of requiring homosexuals who

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186. *Id.*

187. *Watkins*, 847 F.2d at 1346.

188. Frontiero v. Richardson, 411 U.S. 677, 686 (1973).

189. *Watkins*, 847 F.2d at 1346.

190. FRANK BROWNING, THE CULTURE OF DESIRE: PARADOX AND PERVERSITY IN GAY LIVES TODAY 191 (1993).

191. TRIBE, *supra* note 88, at 1610.

192. *Id.* at 1613.

193. 668 F. Supp. 1361 (N.D. Cal. 1987), *rev'd in part, vacated in part*, 895 F.2d 563, *reh'g denied*, 909 F.2d 375 (1990).

applied for security clearance to undergo extended investigations and mandatory adjudications.[194]

The criteria for finding a class to be quasi-suspect differ only slightly from those required to designate a class as suspect. A quasi-suspect class may be found to exist when the government chooses a classification based on "sensitive," rather than suspect, criteria.[195] In designating a class as quasi-suspect, the Supreme Court examines some factors identical to those considered in designating a class as suspect, including whether the group is a "discrete and insular minority,"[196] and whether the characteristic is immutable.[197] The Court has also considered the risk that a particular classification "may serve to stereotype and stigmatize."[198] The stigma attached to being identified as a homosexual is reflected in many ways. For example, sodomy statutes criminalize gay sexual intercourse. Homosexuals are also denied jobs, child custody, housing, and the right to marry.[199] Sometimes, the Court considers whether the class is responsible for its defining characteristic.[200] This argument is substantially the same as that of immutability.[201]

Discrimination based on gender has traditionally been evaluated under the intermediate scrutiny standard.[202] Discrimination based on sexual preference, however, is inherently different from discrimination based on gender. Gender discrimination emphasizes whether a person is male or female. In contrast, discrimination based on sexual preference disregards whether a person is male or female because it applies to men and women equally. For example, neither an all-male nor an all-female married couple would be considered to have the necessary spousal relationship required for family immigration under the first prong of the *Adams* test as it is currently applied.

The requirements for finding a classification to be quasi-suspect are virtually the same as those required to find a classifica-

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194. *Id.* at 1369-70, 1377.

195. TRIBE, *supra* note 88, at 1613.

196. *See supra* note 173 and accompanying text.

197. *See supra* notes 179-86 and accompanying text.

198. TRIBE, *supra* note 88, at 1615. Consequently, the Court has applied an intermediate standard of review to legislation that discriminates based on gender. *Id.*

199. *The Constitutional Status of Sexual Orientation, supra* note 178, at 1285-86.

200. TRIBE, *supra* note 88, at 1615.

201. *See supra* notes 179-86 and accompanying text.

202. *Id.*

tion to be truly suspect. Homosexuals meet the indicia required to find a group to be truly suspect, and, consequently, discrimination against them should be reviewed under the strict scrutiny standard. If the Court refuses to identify homosexuals as a suspect class, however, they should certainly be considered as a quasi-suspect class. Under this classification, legislation discriminating against them would still be entitled to evaluation under a heightened scrutiny standard, which would be more likely to protect their interests than the minimum rationality standard applied to unprotected classes.

c. The Refusal To Recognize Same-Sex Spouses Should Be Given Strict Scrutiny Review Because It Discriminates Against a Fundamental Right

Even if the court does not recognize homosexuals as a suspect or quasi-suspect class, denial of spouse status for same-sex couples should receive strict scrutiny review on another basis. The Supreme Court has recognized marriage as a fundamental right, the denial of which requires that the action causing the denial be subjected to strict scrutiny.[203] A homosexual person can marry independently of his right to bring his "spouse" into the United States. Nevertheless, if a citizen is unable to live with his spouse of a legal marriage because courts will not recognize his partner as a "spouse" for immigration purposes, that citizen is denied the right to marry, with all its associated benefits, that heterosexual citizens receive. Thus, the denial of his fundamental right to marry is entitled to strict scrutiny review.

V. CONCLUSION

Foreign-born same-sex spouses should be granted the same benefits under U.S. immigration law that foreign-born opposite-sex spouses receive, namely, the classification as "spouses" under the INA. When a U.S. court last faced this issue twelve years ago in *Adams v. Howerton*, it held that a marriage must be valid under state law and that Congress must have intended for the spouse to be a "spouse" within the INA for that person to be granted "spouse" status under the Act. The court found it unnecessary to evaluate the validity of the same-sex marriage at issue because the

203. Loving v. Virginia, 388 U.S. 1 (1967).

court concluded that Congress did not intend for the INA to include same-sex spouses.

The basis for the court's decision in *Adams* is no longer valid. A foreign marriage between two people of the same sex could be held valid under state law for several reasons: (1) marriage is a fundamental right; (2) marriages that are valid where celebrated are traditionally valid everywhere, unless contrary to public policy, and public policy reasons do not support failing to recognize same-sex marriages; and (3) homosexual couples have the same privacy interest in this aspect of their lives as heterosexual couples.

In addition, a same-sex spouse could qualify as a "spouse" under the INA. Since the *Adams* decision, Congress has repealed the section of the INA that categorically excluded homosexuals from immigration and, thus, suggested to the *Adams* court that homosexuals were not to be considered "spouses" within the Act. The section was repealed because Congress felt that it was no longer reasonable to discriminate against homosexuals on this basis. Thus, a court could conclude that same-sex spouses qualify for "spouse" status, especially after considering the equal protection claims of the same-sex spouse who is a U.S. citizen.

Some fear the possible consequences of a state's recognition of same-sex marriages, such as sham marriages or gays flocking to a state to marry and then seeking benefits in other states. Nevertheless, the benefits that the partners to the marriage would receive would be no different than those to which they would be entitled if they chose to marry a person of the opposite sex. People do not worry about a heterosexual couple's illegitimate reasons for marriage. Rather, opponents of same-sex marriage use these pretenses to justify denying homosexual couples the rights to which they are legally entitled.

Additionally, recognizing same-sex marriages would provide benefits not just to homosexuals, but to society generally. Denying the ability to marry legally and to obtain the benefits of marriage does not encourage the maintenance of monogamous relationships; yet, monogamous relationships are crucial to prevent the spread of AIDS. Sweden acknowledged this as the purpose of its legislation granting rights to live-in sexual relationships.[204] Similar rights in the United States could help control the spread of this disease.

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204. *See supra* note 48 and accompanying text.

Additionally, recognition of same-sex marriages would encourage or even force spouses of such marriages to support any children born to or adopted by either spouse and raised as their joint child.

Both the law and policy reasons support the recognition of same-sex marriages generally and for immigration purposes. When faced with a situation similar to the hypothetical above, a court should recognize the foreign same-sex spouse as a "spouse" within the meaning of the INA.[205]

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205. Just prior to publication of this Note, Sweden passed a law legalizing same-sex marriages. Sweden Joins in Approving Partnership Law for Gay Couples, L.A. TIMES, June 15, 1994, at E3. The law, which becomes effective in 1995, will grant same-sex couples the same inheritance, tax rights, and obligations as those granted to heterosexual married couples. *Id.* This recent development reflects the growing global trend toward the recognition of homosexual rights.